IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. MICHAEL GIVENTER, MARGARET GIVENTER, PHILIP SALKINDER, MEMORIAL SURGICAL CENTER, INC., MEMORIAL SURGICAL CENTER 2, LTD., ADVANCED REHABILITATION and PAIN MANAGEMENT, P.A., COMFORT IMAGE, INC. d/b/a OPEN MRI, ROMAN SPECTOR (a/k/a ROMAN SPEKTOR), YOSIF BATKILIN, and ZHANNA BATKILIN, Defendants.	§ § § § § § § § § § § § § § § § § § §	CIVIL ACTION NO. H-03-2561 **(JURY TRIAL REQUESTED)**

RULE 12(B)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND, SUBJECT THERETO, MOTION TO DISMISS DECLARATORY JUDGMENT ACTION, OF DEFENDANTS PHILIP SALKINDER, MEMORIAL SURGICAL CENTER, INC., MEMORIAL SURGICAL CENTER 2, LTD., AND COMFORT IMAGE, INC., d/b/a OPEN MRI

I. The 12(b)(6) Motion

1. Prior to filing any other pleading in this cause defendants Philip Salkinder, Memorial Surgical Center, Inc. [MSCI], Memorial Surgical Center 2, Ltd. [MSC2], and Comfort Image, Inc., d/b/a Open MRI [Open MRI], respectfully move, pursuant to FED. R. CIV. PROC. 12(b)(6), to dismiss all causes of action raised against them in this proceeding for the plaintiff's failure to state a claim against these defendants upon which relief can be granted.

II. The Motion to Dismiss Declaratory Judgment Complaint

2. Subject to the Rule 12(b)(6) motion, these defendants also move that the district court exercise its discretion to dismiss this declaratory judgment action pursuant to the doctrine of *Brillhart v. Excess Ins. Co. of America,* 316 U.S.491, 86 L.Ed. 1620, 62 S.Ct. 1173 (1942).

III. The Factual Background

3. In 1998, State Farm sued Michael Giventer and others in Case No. H-98-4150 [the Underlying RICO Suit]. (Doc. # 1, Exh. A). In that suit, State Farm accused Michael Giventer of being involved in a vast scheme conducted over several years to defraud State Farm of millions of dollars through false auto accident claims. (Doc. # 1, Exh. A, pp. 6-10). State Farm accused Michael Giventer of numerous felonies, including fraud and racketeering. (Doc. # 1, Exh. A., pp. 11-15).

4. On December 7, 2001, the district court entered findings of fact in the Underlying RICO Suit, finding as fact all of the felony allegations of State Farm against Michael Giventer. (Exh. A). Judgment was entered in favor of State Farm against Michael Giventer on the same date. (Doc. # 1, Exh. B(1)). The amount of the judgment exceeded $14,000,000. (Doc. # 1, p. 4, ¶ 16).

5. State Farm proceeded over the next year to attempt collection from Michael Giventer, apparently without much success.

6. In April 2002, MSCI and MSC2 were served with subpoenas, issued at the instance of State Farm in the Underlying Suit, to produce all records concerning Michael Giventer. The respondents prepared objections to the subpoena and a motion to quash, which were duly

served on State Farm's counsel on April 18 or 19, 2002. Before the motion was filed with the court, though, State Farm's counsel called respondents' counsel and advised that he was in possession of substantial documented evidence with respect to some alleged vague interest State Farm theorized Michael Giventer might have had in MSCI and/or MSC2. Accordingly, since that appeared at least arguably to be a legitimate area of inquiry, counsel for MSCI and MSC2 agreed not to file the motion to quash, pending receipt of said evidence from State Farm's counsel. (Exh. B). However, when the "evidence" was produced, it consisted only of portions of the deposition testimony of Margaret Giventer, which was not to that effect at all. (Exh. C).

7. Nonetheless, because Michael Giventer did not own and had never owned any interest in MSCI or MSC2, and to avoid an unnecessary hearing, counsel for MSCI and MSC2 reached an agreement to produce certain corporate documents pursuant to a confidentiality agreement. Said documents were produced to State Farm on or about June 21, 2002. (Exh. D). On October 10, 2002, State Farm wrote another letter, requesting even more documents from MSCI and MSC2. (Exh. E). Most of the requests were for items previously produced or that had no possible relevance to the claims being raised against MSCI or MSC2. Accordingly, voluntary production of additional documentation was declined. (Exh. F).

8. On January 29, 2003, the district court granted State Farm's motion to reopen the Underlying RICO Suit and to add, as third-party defendants, three parties, Roman Spector, Ludmilla Gudgartz, and Margaret Giventer, Michael Giventer's former spouse. (Exh. G). State Farm contended that Michael Giventer had fraudulently transferred assets to these proposed third-party defendants. No request was made to add these movants, however, nor were these

movants mentioned in the district court's order of January 29, 2003.

9. On March 10, 2003, State Farm apparently persuaded Michael Giventer, a convicted felon facing a debt of more than $14,000,000, to execute an affidavit in the Underlying RICO Suit, which was undoubtedly prepared by State Farm. In the affidavit, Michael Giventer not surprisingly swore to essentially every speculative theory State Farm has ever conceived against anyone who ever knew Michael Giventer. (Doc. # 1, Exh. B). On March 13, 2003, State Farm and Michael Giventer entered into some type of "Forbearance Agreement" with regard to execution on the judgment. (*See* Doc. # 1, Exh. C, p. 2, ¶ 7: "Giventer and State Farm agree that this assignment will not in any way affect or diminish State Farm's right to seek full enforcement and collection of the final judgment entered [in the Underlying Suit] against [Michael] Giventer... *subject to that certain Forbearance Agreement entered into by the parties dated March 13, 2003....*).

10. Once the Forbearance Agreement was executed, State Farm got Michael Giventer to assign to State Farm all interest allegedly "equitably" owned by Michael Giventer in MSCI, MSC2, Open MRI, and various other entities. (Doc. # 1, Exh. C). Michael Giventer claims no legal interest in any of the entities.

11. It is painfully obvious that State Farm agreed not to execute against Michael Giventer in exchange for securing highly questionable "evidence" that Michael Giventer had some equitable interest in viable corporate entities, and an assignment of those interests to State Farm.

12. Margaret Giventer filed a motion to reconsider State Farm's motion to reopen the Underlying RICO Suit and to add additional parties, including Margaret Giventer. On June 6, 2003,

Margaret Giventer's motion was granted by the district court, and the entire Underlying RICO Suit was dismissed. (Exh. H). A motion to reconsider the June 6 order is presently pending.

13. The instant suit was filed one month later, on July 11, 2003. In this suit, not only is State Farm still seeking recovery of property allegedly fraudulently transferred by Michael Giventer to Margaret Giventer, but State Farm is also now seeking a "declaratory judgment" that State Farm owns whatever interests Michael Giventer supposedly "equitably owned" in MSCI, MSC2, Open MRI, and other business entities.

IV. Legal Authorities

14. First, Philip Salkinder is sued solely as one of the principals of MSCI, MSC2, and Open MRI. State Farm raises no actionable claims against Salkinder in its complaint. Accordingly, State Farm states no claim against Salkinder upon which relief can be granted and he should be dismissed.

15. As the factual basis of its claims against MSCI, MSC2, and Open MRI, State Farm asserts that Michael Giventer was a part owner of MSCI (and subsequently MSC2 and Open MRI), until 1999, when Michael Giventer was supposedly "kicked ... off the premises" by Salkinder, allegedly denying Michael Giventer of his alleged ownership interest in those entities (and all rights, privileges, and proceeds related thereto), since that time. (Doc. # 1, pp. 9-10, ¶¶ 36-37).

16. There is a cause of action available in Texas by a person aggrieved by the conduct described in this regard by State Farm and its assignee, Michael Giventer: conversion. According to Texas law:

> [c]onversion occurs when one person makes an unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another, to the exclusion of or inconsistent with the owner's rights.

Hodge v. Northern Trust Bank of Texas, N.A., 58 S.W.3d 518, 523 (Tex.App.-Eastland 2001, pet. denied), *citing Walsath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 447 (Tex. 1971).

17. Causes of action for conversion are governed by the two year limitations period of the Texas Civil Practices & Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a), *and Hodge,* 58 S.W.3d at 523. The reason State Farm did not want to sue these defendants for the available legal remedies under the tort of conversion is because the two year limitations period has passed. TEX. CIV. PRAC. & REM. CODE § 16.16.003(a). *See also Hodge,* 58 S.W.3d at 523.

18. However, it is well-settled that, when a legal remedy is barred by limitations under substantive law, the claim cannot be revived by filing, with "creative labeling," a suit to seek similar relief arising from the same conduct under the Declaratory Judgment Act. *Algrant v. Evergreen Valley Nurseries Ltd. Partnership,* 126 F.3d 178, 181-82 (3d Cir. 1997); *International Ass'n of Machinists & Aerospace Workers v. Tennessee Valley Authority,* 108 F.3d 658, 667-68 (6th Cir. 1997); *Gilbert v. City of Cambridge,* 932 F.2d 51, 58 (1st Cir.), *cert. denied,* 502 U.S. 866 (1991). Accordingly, because limitations would prevent relief from being granted under the substantive law for the same claims raised in this declaratory judgment proceeding, dismissal of the declaratory judgment proceeding pursuant to FED. R. CIV. PROC. 12(b)(6) is appropriate. *Algrant,* 126 F.3d at 181, 188.

19. Moreover, the district court has great discretion in determining whether to allow a declaratory action to proceed. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289-90, 132 L.Ed.2d 214, 115 S.Ct. 2137, 2144 (1995); *Brillhart,* 316 U.S. at 491. *See also Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir. 1983). To quote the Fifth Circuit: "The Declaratory Judgment Act gives the court a choice, not a command." *Id.*

20. In determining whether to exercise its discretion in allowing a declaratory judgment action to proceed, the court can and should consider a variety of factors. *Id.* One factor that can be given considerable weight by the district court is the availability of a forum where a traditional remedy might be obtained for the same relief requested in the declaratory judgment action. *Torch, Inc. v. LeBlanc,* 947 F.2d 193, 196 (5th Cir. 1991). That is appropriate where "the traditional remedy provides the parties with the procedural safeguards required by the law to insure the availability of a proper remedy...." *Id.*

21. It is undisputed that none of the stock of MSC2 or Open MRI has ever been owned by Michael Giventer, and that Michael Giventer has never been a partner in MSC2. (Doc. # 1, pp. 9-11, 16, 18). If there were any truth to the allegations made by Michael Giventer in his affidavit concerning his alleged "equitable" interest in these entities, Michael Giventer could have sued these defendants for the legal remedy of monetary damages for conversion of his interests. *Hodge,* 54 S.W.3d at 521. State Farm, as Michael Giventer's assignee, could have made the same claims, in federal or state court, but it elected not to do so. Instead, State Farm seeks only a "declaration" as to the alleged percentage interest it has, as Michael Giventer's assignee, in the corporate entities (partnership entity as to MSC2).

22. Regardless of how State Farm might attempt to characterize its claim, though, the essence of the claim against these defendants is that stock allegedly owned by Michael Giventer in MSCI and Open MRI were purportedly converted by the corporations and the legal shareholders of those entities sometime in 1999. Michael Giventer had only until 2001 to raise any such conversion claims on a timely basis. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a), *and Hodge,* 58 S.W.3d at 523.

23. In this instance, it is clear that State Farm has attempted to characterize this claim as a declaratory judgment proceeding solely to avoid the two year statute of limitations applicable to a claim that is, in reality, a claim of tortious conversion. Procedurally, Texas law does not allow a litigant to recast claims by "artful pleading" to avoid limitations or other dispositive case law. *See Earle v. Ratliff,* 988 S.W.2d 882, 893 (Tex. 1999). *See also Hodge,* 54 S.W.3d at 521. Federal law is in accord. *Torch, Inc.,* 947 F.2d at 196.

24. Accordingly, defendants Philip Salkinder, Memorial Surgical Center, Inc., Memorial Surgical Center 2, Ltd., and Comfort Image, Inc., d/b/a Open MRI, respectfully move, pursuant to FED. R. CIV. PROC. 12(b)(6), that the district court dismiss all causes of action raised against them in this proceeding for the plaintiff's failure to state a claim against these defendants upon which relief can be granted. Moreover, these defendants respectfully pray that this district court exercise its discretion to dismiss this declaratory judgment action.

Respectfully submitted,

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Certificate of Service

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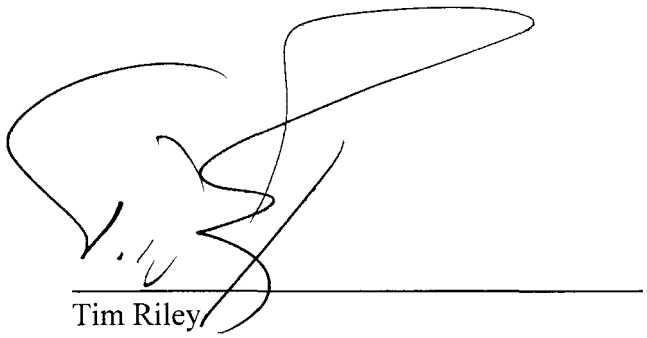

Tim Riley

The Exhibit(s) May

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